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No. 97-475

In the Supreme Court of the United States

OCTOBER TERM, 1997

EL AL ISRAEL AIRLINES, LTD., PETITIONER

v.

TSUI YUAN TSENG

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a passenger who suffers personal injury within the scope of the Warsaw Convention (which addresses international transportation by air), but who cannot meet the conditions set forth in Article 17 of the Convention for establishing that a carrier is liable under the Convention itself, may nonetheless seek relief under state law.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	1
Summary of argument	12
Argument:	
The Warsaw Convention bars suits under local law for personal injuries that arise within the course of international air travel but do not meet the Convention's conditions for liability	14
A. The Convention forecloses respondent's state law damages action	15
B. Ratification of Montreal Protocol No. 4 by the United States could affect the Court's consideration of this case	28
Conclusion	30

TABLE OF AUTHORITIES

Cases:

Abnett v. *British Airways PLC*, 1 All E.R. 193 (1996)	9, 13, 19, 21, 23, 24
Abramson v. *Japan Airlines Co.*, 739 F.2d 130 (1984), cert. denied, 470 U.S. 1059 (1985)	9
Air Disaster at Lockerbie, Scotland, on Dec. 21, 1988, In re, 928 F.2d 1267 (2d Cir.), cert. denied, 502 U.S. 920 (1991)	3, 4
Air France v. *Saks*, 470 U.S. 392 (1985)	*passim*
Benjamins v. *British European Airways*, 572 F.2d 913 (2d Cir. 1978), cert. denied, 439 U.S. 1114 (1979)	2
Boehringer-Mannheim Diagnostics, Inc. v. *Pan Am. World Airways., Inc.*, 737 F.2d 456 (5th Cir. 1984), cert. denied, 469 U.S. 1186 (1985)	2
Day v. *Trans World Airlines, Inc.*, 528 F.2d 31 (2d Cir. 1975), cert. denied, 429 U.S. 890 (1976)	17

Cases—Continued: Page

Dooley v. *Korean Air Lines Co.*, 118 S. Ct. 1890 (1998) 5
Eastern Airlines, Inc. v. *Floyd*, 499 U.S. 530 (1991) ..... *passim*
Evangelinos v. *Trans World Airlines, Inc.*, 550 F.2d 152 (3d Cir. 1977) 17
Korean Air Lines Disaster of Sept. 1, 1983, In re, 932 F.2d 1475 (D.C. Cir.), cert. denied, 502 U.S. 994 (1991) 4, 21
Krys v. *Lufthansa German Airlines*, 119 F.3d 1515 (11th Cir. 1997), cert. denied, 118 S. Ct. 1042 (1998) 9, 20
Martinez Hernandez v. *Air France*, 545 F.2d 279 (1st Cir. 1976), cert. denied, 430 U.S. 950 (1977) 17
Maugnie v. *Compagnie Nationale Air France*, 549 F.2d 1256 (9th Cir.), cert. denied, 431 U.S. 974 (1977) 17-18
Mexico City Aircrash of Oct. 31, 1979, In re, 708 F.2d 400 (9th Cir. 1983) 2-3
Potter v. *Delta Air Lines, Inc.*, 98 F.3d 881 (1996) . 9
Schroeder v. *Lufthansa German Airlines*, 875 F.2d 613 (7th Cir. 1989) 17
St. Paul Ins. Co. v. *Venezuelan Int'l Airways, Inc.*, 807 F.2d 1543 (11th Cir. 1987) 2
Zicherman v. *Korean Air Lines Co.*, 516 U.S. 217 (1996) ..... *passim*

Treaties, statutes and rules: Page

Convention for the Unification of Certain Rules Relating to International Transportation by Air (1929) 49 Stat. 3000 (49 U.S.C. 40105 note) ..... *passim*
Hague Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, done Sept. 28, 1955 ..... 4, 10
Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, done at Guatamala City, Mar. 8, 1971 ..... 10, 12, 26, 29
Additional Protocol No. 3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, done at Montreal, Sept. 25, 1975 ..... 10, 12, 26, 27
Additional Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, done at Montreal, Sept. 25, 1975 ..... *passim*
Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1602, *et seq.* 5
28 U.S.C. 1603(a) 7
28 U.S.C. 1606 6
28 U.S.C. 1441(d) 7
49 U.S.C. 44901 *et seq.* 30
14 C.F.R.:
Pt. 107 29
Pt. 108 29
Sup. Ct. Rule 15.2 18

Miscellaneous:

G.N. Calkins, *The Cause of Action Under the Warsaw Convention, Part I*, 26 J. Air. L. & Com. 217 (1959) 22
Cassell's New French Dictionary (5th ed. 1951) 20
144 Cong. Rec. D685 (daily ed. June 23, 1998) 11
International Air Transport Association: Agreement Relating to Liability Limitations of the Warsaw Convention, approved by Dep't of Transportation Order 97-1-2, WL 4834 (D.O.T. Jan. 8, 1997) 4

Miscellaneous—Continued: Page

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2 International Civil Aviation Org., *International Conference on Air Law, Guatemala City, Feb.-Mar. 1971* (Documents) 27
A. Lowenfeld & A. Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497 (1967) 2, 3-4
Message from the President of the United States Transmitting Two Related Protocols Done at Montreal on Sept. 25, 1975 ..... 10, 11
M. Milde, *The Problems of Liabilities in International Carriage By Air* (A. Kafka trans. 1969) 21
Second Int'l Conference on Private Aeronautical Law, Minutes, Oct. 4-12, 1929, Warsaw (R. Horner & D. Legrez trans. 1975) 3, 22, 24, 25, 26
S. Exec. Rep. No. 45, 97th Cong., 1st Sess. (1981) 12
S. Exec. Rep. No. 21, 101st Cong., 2d Sess. (1990) 11-12
F. Trinio, *Accident Insurance: Death or Injury Intentionally Inflicted by Another as Due to Accidental Means*, 49 A.L.R.3d 673 (1978) 19

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INTEREST OF THE UNITED STATES

As a party to the Warsaw Convention, the United States has a substantial interest in the manner in which the Convention is interpreted by the courts of this country. In response to this Court's invitation, the Solicitor General filed a brief at the petition stage on behalf of the United States as amicus curiae, recommending that the Court grant the petition for a writ of certiorari limited to the question presented here.

STATEMENT

1. The Convention for the Unification of Certain Rules Relating to International Transportation by Air (1929), 49 Stat. 3000 (49 U.S.C. 40105 note),[1] popularly known as the Warsaw Convention, was designed to achieve two basic purposes: to "foster uniformity in the law of international air travel," *Zicherman* v.

[1] This brief cites the various provisions of the Convention directly. Those provisions are codified at 49 U.S.C. 40105 note.

Korean Air Lines Co., 516 U.S. 217, 230 (1996), and to "limit[ ] the liability of air carriers in order to foster the growth of the fledgling commercial aviation industry," *Eastern Airlines, Inc.* v. *Floyd*, 499 U.S. 530, 546 (1991). To those ends, the Convention prescribes an extensive set of legal principles generally applicable "to all international transportation of persons, baggage or goods performed by aircraft." Art. 1(1); see generally A. Lowenfeld & A. Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497 (1967).

At the core of the Convention is a series of provisions governing the nature and scope of a carrier's liability for harms occurring in the course of international air travel. The Convention divides such harms into three categories: personal injury (Article 17), damaged or lost baggage or goods (Article 18), and damage due to delay (Article 19). Article 17, which is at issue here, makes carriers "liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking." It is now generally accepted that a passenger satisfying the liability conditions of Article 17 may bring a cause of action against a carrier directly under the Convention. See *Benjamins* v. *British European Airways*, 572 F.2d 913, 918-919 (2d Cir. 1978), cert. denied, 439 U.S. 1114 (1979); *St. Paul Ins. Co.* v. *Venezuelan Int'l Airways, Inc.*, 807 F.2d 1543, 1546 (11th Cir. 1987); *Boehringer-Mannheim Diagnostics, Inc.* v. *Pan Am. World Airways, Inc.*, 737 F.2d 456, 458-459 (5th Cir. 1984), cert. denied, 469 U.S. 1186 (1985); *In re Mexico City Aircrash of Oct. 31,*

1979, 708 F.2d 400, 408-415 (9th Cir. 1983); cf. *In re Air Disaster at Lockerbie, Scotland, on Dec. 21, 1988*, 928 F.2d 1267, 1282 (2d Cir.), cert. denied, 502 U.S. 920 (1991).

At the time of the Convention, carriers commonly made their services contingent on a passenger's contractual waiver of the right to bring suit for personal injury, and such waivers were often enforceable in court. See Pet. App. 53a-54a; *Second Int'l Conference on Private Aeronautical Law, Minutes, Oct. 4-12, 1929, Warsaw* 47 (R. Horner & D. Legrez trans. 1975) (*Minutes*). To ensure that carriers could not short-circuit Article 17 (or Articles 18 and 19) in that manner, the delegates to the Convention added Article 23, which nullifies "[a]ny provision tending to relieve the carrier of liability." Moreover, to reduce litigation concerning questions of fault, the delegates added Article 20, which, when combined with Article 17, creates a presumption of liability that a carrier can rebut only by "prov[ing] that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures." Art. 20(1).

The creation of a non-waivable cause of action for personal injury under Article 17, together with the presumption of liability added by Article 20, was part of a larger compromise designed to balance the interests of passengers against the interests of the nascent airline industry. Two key provisions of the Convention protect that industry's interests. First, Article 22(1) limits the amount that can be recovered in the event of an accident-related death or bodily injury. The delegates to the Convention set that limit at 125,000 francs, equivalent in 1929 to approximately $4900 dollars. See A. Lowenfeld & A. Mendelsohn,

supra, 80 Harv. L. Rev. at 499 & n.10; see also *Floyd*, 499 U.S. at 546. That was a "low amount even by 1929 standards," *Floyd*, 499 U.S. at 546, and, over the years, foreign and domestic airlines have entered into voluntary, private agreements to waive major aspects of the liability limitations imposed by the Convention. See *id.* at 549.[2]

Second, as a counterpart to Article 23's prohibition on attempts by carriers to circumvent the Convention's liability regime through contractual waiver clauses, the delegates added a provision barring passengers from seeking to circumvent that regime (and in particular its limitation on damages) by bringing suit under domestic law outside the terms of the Convention. That provision, Article 24, gives preemptive effect to Articles 17, 18, and 19, which, as discussed, respectively address a carrier's liability for personal injury, damaged or lost baggage and goods, and delay.

Article 24(1) addresses the latter two categories of liability: "In the cases covered by articles 18 and 19

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[2] In the most recent such agreement, concluded in 1996, several dozen major airlines agreed to waive any limit on compensatory liability for claims arising under, and satisfying the liability conditions of, Article 17. (Punitive damages remain unrecoverable. See generally *Lockerbie*, *supra*; *In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475 (D.C. Cir.), cert. denied, 502 U.S. 994 (1991).) Those airlines further agreed to waive the defense of non-negligence under Article 20 (and thereby effectively agreed to strict liability) for such claims in an amount up to 100,000 "Special Drawing Rights," which, at the current exchange rate, equals approximately $135,000. See Pet. App. 8a; *International Air Transport Association: Agreement Relating to Liability Limitations of the Warsaw Convention*, approved by Dep't of Transportation Order 97-1-2, 1997 WL 4834 (D.O.T. Jan. 8, 1997); see also pp. 10-12 and note 5, *infra* (discussing Montreal Protocol No. 4 and Hague Protocol of 1955).

any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention." Article 24(2) then addresses personal injury: "In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights." The delegates added the final clause ("without prejudice to the questions * * *") because they could not reach consensus on the availability of wrongful death actions and, more generally, on "the questions of who may recover and what compensatory damages are available to them," *Zicherman*, 516 U.S. at 225; those secondary questions they therefore "left to domestic law." See *ibid.*; see generally *Dooley* v. *Korean Air Lines Co.*, 118 S. Ct. 1890 (1998). In contrast, the delegates could and did agree on rules governing the antecedent question of *which events* would subject carriers to personal-injury liability, and those rules appear in Article 17. The principal dispute in this case is whether *those* rules are exclusive: whether, despite Article 24, a plaintiff may sue under local law if she cannot satisfy the conditions of liability under Article 17 for passenger injuries arising during the course of international air travel.

2. a. On May 22, 1993, respondent Tsui Yuan Tseng arrived at John F. Kennedy International Airport in New York to board a flight to Tel Aviv. Pet. App. 3a-4a. The flight was provided by petitioner El Al Israel Airlines, Ltd., a carrier principally owned by the State of Israel. C.A. App. A9-A10.[3] Respondent went

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[3] Respondent has previously argued (see Br. in Opp. 9-11) that, because of Israel's ownership interest, the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. 1602, *et seq.*, deprives

to El Al's terminal, presented her ticket and U.S. passport to an El Al security guard, entered the terminal building, and proceeded to a security area, where she was asked routine questions about her destination. Pet. App. 4a. Based on her answers, which the security guard considered "illogical," respondent was classified as a "high risk" passenger. *Ibid.*

Respondent was taken to a private room, where she was subjected to a security search for explosives and detonating devices. She was told to lower her pants to mid-hip level and to remove her shoes, jacket, and sweater. A female security guard then conducted an exhaustive manual search of respondent's entire body outside of her clothing. The search lasted 15 minutes, and it conformed to El Al procedures. See Pet. App. 4a. The parties appear to agree that respondent did not object to the search and that she had the option of refusing to submit to it, thereby forfeiting the right to board the flight. The parties appear to disagree, however, about whether respondent was told (or should reasonably have known) that she could assert that option. See Tseng Br. in Opp. 2-3.

After the search, El Al personnel determined that respondent did not present a security risk, and they permitted her to board the flight. Respondent later testified that she was "really sick and very upset"

El Al of the protections of the Warsaw Convention. That suggestion is without merit. The FSIA makes a foreign state and its agencies "liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 1606. In this context, that means that the Convention preempts state-law claims against airlines owned by foreign sovereigns to the same extent that it preempts such claims against privately owned airlines. It does not somehow render the former class of airlines *more* susceptible than the latter to claims under state law.

during the flight, that she was "emotionally traumatized and disturbed" during her month-long trip to Israel and thereafter, and that she ultimately had to undergo medical and psychiatric treatment. Pet. App. 4a. Respondent did not claim, however, to have suffered any physical injury. *Id.* at 4a-5a, 28a.

b. Respondent brought suit in state court. She alleged that petitioner "assaulted, and falsely imprisoned and physically and mentally abused her," and she sought $5 million in damages under state-law theories of tort. C.A. App. A13. Petitioner removed the case to federal court pursuant to 28 U.S.C. 1441(d), which authorizes the removal of any action against a "foreign state" as defined in 28 U.S.C. 1603(a). Pet. App. 5a; see C.A. App. A9-A10.

After discovery and a trial, the district court dismissed respondent's claim for personal injury. Pet. App. 26a-28a. The court first noted that Article 17 creates a cause of action only for injuries suffered as a result of an "accident," which this Court has defined as "an unexpected or unusual event or happening that is external to the passenger." *Id.* at 26a (quoting *Air France* v. *Saks*, 470 U.S. 392, 405 (1985)). The court determined that, because petitioner "erroneously" subjected respondent to an "unexpected" full-body search, the search "is fairly accurately characterized as an accident," and the Convention therefore "applies." Pet. App. 27a-28a. The court then dismissed respondent's personal injury claim on the ground that Article 17 allows recovery only for bodily injury and not for the purely psychic injury that respondent had alleged. *Id.* at 28a (citing *Floyd*, 499 U.S. at 552).

c. The court of appeals reversed in relevant part. Pet. App. 1a-23a. The court first ruled that the search did not qualify as an "accident" within the

meaning of Article 17, reasoning that security searches "are an anticipated aspect of international travel," that the search at issue "was part of the airline's normal procedure," and that "the Convention does not aim to derogate from the efforts of international air carriers to prevent violence and terrorism, efforts which are widely recognized and encouraged in the law." Pet. App. 11a-12a. As a result, "under the terms of Article 17 of the Warsaw Convention, [petitioner] may not be held liable in damages to [respondent]." *Id.* at 14a.

The court then held, however, that the Convention does not exclusively define the circumstances under which passengers may recover for personal injuries sustained in the course of international air travel. Pet. App. 14a-23a. According to the court, Article 24 "clearly states that resort to local law is precluded only where the incident is 'covered' by Article 17, meaning where there has been an accident, either on the plane or in the course of embarking or disembarking, which led to death, wounding or other bodily injury." *Id.* at 15a. To preclude resort to local law where a plaintiff cannot meet the liability criteria under Article 17, the court believed, "would require rewriting Article 24 or Article 17, a task only the signatories to the Convention may undertake." *Id.* at 15a-16a.

The court sought support for its construction of Article 24 in the drafting history of the Convention, Pet. App. 16a-17a, and in the Convention's underlying purposes, *id.* at 18a-23a. The court recognized that "one of the two primary purposes of the Convention was to shield carriers from financial catastrophe following in the wake of a major accident," but it concluded that "the Convention does not purport to insu-

late carriers from the ordinary risks of doing business, such as keeping their facilities in good repair." *Id.* at 19a. Finally, the court held that, as interpreted by this Court in *Zicherman*, "the Convention expresses no compelling interest in uniformity that would warrant us in supplanting an otherwise applicable body of law, here state law." *Id.* at 21a.[4]

In narrowly construing Article 24, the court of appeals deepened a conflict in judicial authority on whether the Convention exclusively defines the conditions for personal injury liability in the context of international air travel. As the court recognized (Pet. App. 18a-21a), its decision in this case, like the Third Circuit's decision in *Abramson* v. *Japan Airlines Co.*, 739 F.2d 130 (1984), cert. denied, 470 U.S. 1059 (1985), is in conflict with the Fifth Circuit's decision in *Potter* v. *Delta Air Lines, Inc.*, 98 F.3d 881 (1996), and with the British House of Lords' recent decision in *Abnett* v. *British Airways PLC*, 1 All E.R. 193 (1996) (reprinted at Pet. App. 34a-65a) (referred to as *Sidhu* v. *British Airways* in the decision below). See also *Krys* v. *Lufthansa German Airlines*, 119 F.3d 1515, 1518 n.8 (11th Cir. 1997), cert. denied, 118 S. Ct. 1042 (1998).

3. This Court granted certiorari on May 18, 1998. 118 S. Ct. 1793. Since then, the Senate Foreign Relations Committee has voted to report to the full Senate certain treaty amendments that, if ratified, could

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[4] Respondent also alleged, in addition to her personal injury claim, a claim for lost baggage. See Pet. App. 5a. The district court ruled that the claim had merit and awarded her $1034.90 in damages. *Id.* at 32a-33a. Without analysis, the court of appeals rejected petitioner's cross-appeal challenging that award. *Id.* at 23a. This Court did not grant review of the second question presented in the petition, which challenged the court of appeals' judgment on that issue. 118 S. Ct. 1793 (1998).

affect how this Court might choose to dispose of this case.

In January 1977, President Ford transmitted to the Senate Montreal Protocol No. 4, which would amend substantial portions of the Warsaw Convention, including Article 24. See Message from the President of the United States Transmitting Two Related Protocols Done at Montreal on September 25, 1975 (Transmittal Letter); Additional Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, done at Montreal, Sept. 25, 1975 (Montreal Protocol No. 4).[5] As this Court has observed, both Montreal Protocol No. 4 and a separate Montreal Protocol No. 3 (which largely incorporates the Guatemala City Protocol of 1971)[6] have remained in the Senate, unratified,

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[5] On July 1, 1998, we notified this Court by letter of the Senate's renewed consideration of Montreal Protocol No. 4. We have lodged with the Clerk of this Court copies of that Protocol, President Ford's transmittal letter, and the Hague Protocol of 1955, which Articles XVII and XIX of Montreal Protocol No. 4 incorporate by reference and which had not previously been ratified by the United States. The Hague Protocol would itself add or amend several provisions of the Warsaw Convention that are not directly at issue here. See, *e.g.*, Hague Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage By Air, done Sept. 28, 1955, Arts. XI (raising personal injury damages cap to 250,000 francs), XII (addressing contractual provisions "governing loss or damage resulting from the inherent defect, quality or vice of the cargo carried").

[6] See Additional Protocol No. 3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, done at Montreal, Sept. 25, 1975 (Montreal Protocol No. 3), Art. VII(2); Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage By Air, done at Guatemala City, Mar. 8, 1971 (Guatemala City Protocol).

since the President transmitted them. See *Floyd*, 499 U.S. at 549-550; *Saks*, 470 U.S. at 403. Indeed, until June 1998, Montreal Protocol No. 4 had not taken effect in any country because, by its terms, the Protocol does not enter into force until after 30 signatories have deposited their instruments of ratification with the Government of Poland. See Montreal Protocol No. 4, Art. XVIII.

We have been informed that on June 14, 1998, after the 30-nation condition was finally met, Montreal Protocol No. 4 entered into force in the countries that had ratified it. Subsequently, on June 23, 1998, the Senate Foreign Relations Committee voted to order that Montreal Protocol No. 4 be reported favorably to the full Senate. See 144 Cong. Rec. D685 (daily ed.). We have been further informed that the completion of the Committee's official report recommending ratification is expected in the near future.

Among other provisions (see generally Transmittal Letter v-viii), Montreal Protocol No. 4 would amend Article 24 of the Warsaw Convention to read: "*In the carriage of passengers and baggage*, any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention, without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights." Montreal Protocol No. 4, Art. VIII (emphasis added). The Senate Foreign Relations Committee has previously stated that similar language in the Guatemala City Protocol "makes clear" that the Convention's "conditions and limits" apply to any "actions for damages" sustained during the course of international air travel. S. Exec. Rep. No. 21, 101st Cong., 2d Sess. 15 (1990) (1990

Senate Report); accord S. Exec. Rep. No. 45, 97th Cong., 1st Sess. 12 (1981).[7]

SUMMARY OF ARGUMENT

Article 24 of the Warsaw Convention provides that, "[i]n the cases covered by article 17," "any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention." Those "conditions and limits" include the substantive conditions for personal injury liability set forth in Article 17 itself. The "exclusivity" question presented here—whether the Convention precludes suits under local law where a passenger *cannot* meet those substantive liability conditions—thus

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[7] The Guatemala City Protocol, which was largely incorporated by Montreal Protocol No. 3 (see 1990 Senate Report at 12), provides: "In the carriage of passengers and baggage any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and limits of liability set out in this Convention, without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights." *Id.* at 35. If *both* Montreal Protocols were ratified, as the 1990 Senate Report had conditionally recommended, that language, like other "provisions * * * concerning passengers and baggage," would have prevailed over the slightly different language of Montreal Protocol No. 4. See Montreal Protocol No. 4, Art. XXIV(b). In its most recent action, however, the Foreign Relations Committee has recommended that the Senate ratify only Montreal Protocol No. 4. (We have been informed that, like the Guatemala City Protocol, Montreal Protocol No. 3 has not entered into force in any country.) We have found no indication that the differences in language between the Guatemala City Protocol and Montreal Protocol No. 4 were intended to have any bearing on the issue presented here. Finally, Montreal Protocol No. 4, unlike the Guatemala City Protocol (see *Floyd*, 499 U.S. at 549-550), makes no amendment to Article 17.

turns on the meaning of Article 24(2)'s introductory clause: in the governing French (see *Zicherman* v. *Korean Air Lines Co.*, 516 U.S. 217, 225 n.3 (1996)), "[d]ans les cas prévus à l'article 17." Literally translated, that clause means "in the circumstances anticipated [or 'foreseen'] in Article 17." The court of appeals narrowly construed that language to denote only those cases in which a plaintiff can in fact satisfy the liability conditions of Article 17. Under that interpretation, if a plaintiff cannot satisfy Article 17's liability conditions, she may, for that reason alone, bring suit under local law to evade *all* of the "conditions and limits set out in this convention."

That view of Article 24 is incorrect, as the British House of Lords held in *Abnett* v. *British Airways PLC*, 1 All E.R. 193 (1996) (reprinted at Pet. App. 34a-65a). Article 24(2) refers to Article 17 simply as a shorthand to denote the class of all cases involving personal injuries to passengers (which Article 17 comprehensively "anticipates") and to distinguish those cases from cases involving damaged baggage or delay, to which Article 24(1) refers with the parallel phrase "les cas prévus aux articles 18 et 19." Article 24(2) thus provides that Article 17 sets forth the exclusive conditions under which a carrier can be subjected to liability for personal injuries suffered by a passenger in the course of international air travel. Unlike the court of appeals' approach, that interpretation of Article 24 respects the Convention's overriding objective, expressed in the preamble, of "regulating in a uniform manner the conditions of international transportation by air in respect of * * * the liability of the carrier." And both the negotiating history of the Convention and the postratification understanding of the contracting parties (see gener-

ally *Zicherman*, 516 U.S. at 226) support the same interpretation.

As previously discussed, after this Court had granted certiorari, the Senate Foreign Relations Committee ordered that Montreal Protocol No. 4, which has remained in the Senate since President Ford first transmitted it in January 1977, be favorably reported to the full Senate. Among other things, the Protocol would amend the introductory clause at issue here ("[i]n the cases covered by article 17") to read: "[i]n the carriage of passengers and baggage." Where ratification has made it applicable, the Protocol would resolve, at least on a prospective basis, any doubt about the Convention's broad exclusivity in personal injury matters. At the same time, ratification of the Protocol by the United States would diminish the continuing legal significance of a decision in this case. We will keep the Court apprised of further developments concerning ratification of the Protocol.

ARGUMENT

THE WARSAW CONVENTION BARS SUITS UNDER LOCAL LAW FOR PERSONAL INJURIES THAT ARISE WITHIN THE COURSE OF INTERNATIONAL AIR TRAVEL BUT DO NOT MEET THE CONVENTION'S CONDITIONS FOR LIABILITY

The parties and the courts below have based their analysis of this case on the Warsaw Convention in its original form, which (as of the filing of this brief) remains in force in the United States. As discussed in Point A below, the Convention, even in that original form, bars this state law action because respondent cannot satisfy the Convention's own liability conditions. Moreover, any doubt about the Convention's exclusivity would be decisively resolved, at

least as to future cases, by Montreal Protocol No. 4, if it is ratified by the United States. In Point B below, we discuss how ratification of the Protocol could affect the proper disposition of this case.

A. The Convention Forecloses Respondent's State Law Damages Action.

The task of interpreting a treaty "begin[s] with the text of the treaty and the context in which the written words are used." *Eastern Airlines, Inc.* v. *Floyd*, 499 U.S. 530, 534 (1991) (internal quotation marks omitted). It is inappropriate, however, to expect multilateral treaties, negotiated and drafted by numerous international delegates, to meet the standards of linguistic precision applicable to private contracts and domestic statutes. For that reason, "treaties are construed more liberally than private agreements, and to ascertain their meaning [the Court] may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Id.* at 535; see also *Zicherman* v. *Korean Air Lines Co.*, 516 U.S. 217, 226 (1996).

1. The Convention is divided into several chapters, two of which are at issue here: Chapter I (Arts. 1-2), entitled "Scope—Definitions," and Chapter III (Arts. 17-30), entitled "Liability of the Carrier." As their titles suggest, Chapter I defines the scope of the Convention, and Chapter III defines the circumstances, within that scope, in which the Convention makes a carrier liable for various harms.

The central scope provision of Chapter I—Article 1(1)—provides that "[t]his convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft," either "for hire" or "gratuitous[ly]." That is general language, and other

provisions of the Convention clarify, for different contexts, when a person or item of baggage is within "international transportation * * * by aircraft" for purposes of Article 1(1). In particular, Article 17 makes clear that, in the specific context of suits for personal injury, the Convention addresses a carrier's liability to "passenger[s]" for harms occurring "on board the aircraft or in the course of any of the operations of embarking or disembarking." See generally *Air France* v. *Saks*, 470 U.S. 392, 401-402 (1985).[8] Because the Convention's preemptive effect on local law extends no further than the Convention's own substantive scope, a carrier is indisputably subject to liability under local law for injuries arising outside of that scope: *e.g.*, for passenger injuries occurring before "any of the operations of embarking." Cf. Pet. App. 20a-21a (expressing concern that wrongdoers not escape liability for accidents on airport escalators).

The question presented here, however, is whether a carrier may be found liable under local law for personal injury arising *within* the scope of the Convention—during "international transportation of persons * * * by aircraft" (Art. 1(1))—if the injured passenger cannot satisfy the substantive conditions for liability under the Convention itself. Article 17

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[8] Similarly, Article 18 provides that, as to baggage and goods, transportation by air generally "comprise[s] the period during which the baggage or goods are in charge of the carrier, whether in an airport or on board an aircraft," but "shall not extend to any transportation by land, by sea, or by river performed outside an airport," except in certain limited circumstances. Art. 18(2). As discussed below (pp. 25-26 and note 16), the delegates split Articles 17 and 18 into separate provisions in part because Article 1(1)'s scope provision needed to be clarified in two different ways in the two distinct contexts addressed by Articles 17 and 18.

sets forth two such conditions. First, the event causing the plaintiff's injury must have been an "accident" in the specialized sense applicable here: it must have been both "unexpected or unusual" and "external to the passenger." *Saks*, 470 U.S. at 405 (hearing loss caused by normal loss of cabin pressure does not qualify as "accident"); see also note 11, *infra*. Second, the harm itself must take the form of "death or * * * bodily injury." See *Floyd*, *supra* (Article 17 does not create cause of action for mental anguish caused by narrowly averted crash). This Court has twice declined to address whether a plaintiff, unable to satisfy one or the other of those liability conditions, may nonetheless bring a cause of action under state law. See *Saks*, 470 U.S. at 408; *Floyd*, 499 U.S. at 553.

This case squarely presents that question of exclusivity. The parties and courts below have all assumed—correctly, we believe—that the security search in question, although conducted in an airport terminal building before the flight, occurred in "international transportation" (Art. 1(1)): that is, "in the course of any of the operations of embarking or disembarking" (Art. 17). See, *e.g.*, Pet. App. 14a.[9] It is

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[9] In determining whether a plaintiff was injured during operations of embarkation, the courts of appeals focus on the plaintiff's location and activity and on the extent to which the airline exercised control over the plaintiff at the time the injury occurred. See, *e.g.*, *Schroeder* v. *Lufthansa German Airlines, Inc.*, 875 F.2d 613, 617 (7th Cir. 1989); *Evangelinos* v. *Trans World Airlines, Inc.*, 550 F.2d 152, 155 (3d Cir. 1977) (en banc); *Martinez Hernandez* v. *Air France*, 545 F.2d 279, 282 (1st Cir. 1976), cert. denied, 430 U.S. 950 (1977); *Day* v. *Trans World Airlines, Inc.*, 528 F.2d 31, 33 (2d Cir. 1975), cert. denied, 429 U.S. 890 (1976). Cf. *Maugnie* v. *Compagnie Nationale Air France*, 549 F.2d 1256, 1262 (9th Cir.) (applying slightly different "total[ity of the] circumstances" test), cert. denied,

therefore undisputed that, in that respect, the events at issue fall within the scope of the Convention.[10]

It is also undisputed that respondent could not meet the conditions for liability set forth in Article 17. The court of appeals reached that conclusion on the ground that the search in question was not an "accident" within the meaning of Article 17. See Pet. App. 14a. Although petitioner had urged the court of appeals to affirm the district court's finding that the search was in fact an "accident," petitioner conceded at the petition stage, for purposes of this Court's review, that the court of appeals' disposition of that threshold issue was correct (see Pet. i (questions presented), 7), and respondent agreed (see Br. in Opp. 13). We believe that it would be appropriate for this Court to accept the parties' agreement on that issue.[11]

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431 U.S. 974 (1977). The security search at issue here would appear to satisfy those tests.

[10] Article 25 of the Warsaw Convention provides that "willful misconduct" disqualifies a carrier from availing itself "of the provisions of this convention which exclude or limit [its] liability." (If ratified, Montreal Protocol No. 4 would substantially amend Article 25. See note 11, *infra*.) In both the district court and the court of appeals, respondent relied on Article 25 as a basis for "tak[ing] the case outside the Convention's limitations of liability." Pet. App. 27a. As we noted in our amicus brief at the petition stage (at 12-13), Article 25 is not at issue in this case. After trial, the district court specifically found, as a factual matter, that petitioner's actions were not willful, Pet. App. 27a, and respondent did not properly preserve any challenge to that finding either in the court of appeals or in her brief in opposition to certiorari (which does not even cite Article 25). See Sup. Ct. R. 15.2.

[11] The definition of "accident" has been "flexibly applied" in this context to include not just inadvertent harms, but reckless and even intentional torts as well, such as "torts committed by terrorists." *Saks*, 470 U.S. at 405. The term is often given

But even if there were some basis for uncertainty about the proper characterization of this search, cf. *Saks*, 470 U.S. at 405, this case would still present the core question of the Convention's exclusivity. That is so because respondent's claim fails to meet an independent condition for liability under Article 17: she has not alleged that she suffered a "bodily injury" within the meaning of that provision. See Tseng C.A. Br. 16, 19, 20, 24; see also Br. in Opp. 4.[12]

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a similarly expansive meaning in the context of insurance law: "In the absence of a policy provision on the subject, there is much support for the view that injury or death intentionally inflicted by a third person upon the insured is nevertheless due to accident or accidental means where it was neither foreseen, expected, nor anticipated *by the insured*." F. Tinio, *Accident Insurance: Death or Injury Intentionally Inflicted by Another as Due to Accident or Accidental Means*, 49 A.L.R.3d 673, 678 (1973) (emphasis added; footnotes omitted). The expansive scope of the term "accident" is one answer to the court of appeals' concern (Pet. App. 20a) that carriers not escape liability for their intentional torts. See also *id.* at 64a-65a (*Abnett* decision); cf. Warsaw Convention, Art. 25(1) ("[t]he carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability," if the carrier or its agent, acting within the scope of his employment, acts with "willful misconduct"); Montreal Protocol No. 4, Arts. IX, X (amending Article 25 to provide that "the limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment."); note 10, *supra* (discussing Article 25).

[12] Disputes about the Convention's exclusivity arise most commonly in cases (such as *Saks*) in which the plaintiff has suffered physical injuries but the cause of those injuries was not an "accident," rather than in cases (such as *Floyd*) in which the plaintiff's injuries *were* caused by an "accident" but are not

2. Article 24 governs the ultimate legal dispute in this case: whether a passenger's failure to meet the liability conditions of Article 17 precludes recovery under local law for events falling within "international transportation * * * by aircraft" (Art. 1(1)). Read together, the two paragraphs of Article 24 provide that, "[i]n the cases covered by article 17," "any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention." Cf. p. 5, *supra* (discussing final clause of Article 24(2)). In other words, "[i]n the cases covered by article 17," an injured passenger may sue an airline for personal injury only if she meets all of the various "conditions" of, and "limits" on, liability set forth in the Convention. The central question is the meaning of the phrase that triggers Article 24's preemptive effect: "cases covered by article 17."

In the governing French text (see *Zicherman*, 516 U.S. at 225 n.3), that phrase reads, "[d]ans les cas prévus à l'article 17," which, literally translated, means "in the circumstances anticipated [or 'foreseen'] in Article 17." See *Cassell's New French Dictionary* 130, 565-566 (5th ed. 1951). There are two

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"bodily" in character. In our view, however, the ultimate answer to the exclusivity question should be the same in both situations. Either the Convention permits liability under local law if the "accident" and "bodily injury" conditions for liability under Article 17 are unmet, or it does not; there is no persuasive reason why the answer to that question should turn on *which* of those conditions is unmet. But cf. Pet. App. 27a-28a (seeming to assume that Convention "applies," and is given preemptive effect, if and only if injury-causing event qualifies as an "accident"); *Krys* v. *Lufthansa German Airlines*, 119 F.3d 1515, 1518 n.8 (11th Cir. 1997) (similar), cert. denied, 118 S. Ct. 1042 (1998).

ways to interpret that phrase. In respondent's view, and in the view of the court of appeals, the phrase narrowly denotes the cases in which the plaintiff could actually bring a cause of action under Article 17. Under that approach, a plaintiff who could *not* satisfy the liability conditions of Article 17 could nonetheless bring a cause of action under local law, and—precisely because she could not satisfy Article 17's conditions—she would be free of *all* of the "conditions and limits set out in this convention."

Under the alternative interpretation, the phrase "les cas prévus à l'article 17" serves as a shorthand for personal injury cases in general—which Article 17 addresses (or "anticipates") comprehensively—and distinguishes that class of cases from cases involving damaged or lost luggage and delay, to which Article 24(1) refers with the parallel phrase "les cas prévus aux articles 18 et 19" (see *Zicherman*, 516 U.S. at 225 n.3). That is the interpretation adopted by the British House of Lords at *Abnett* v. *British Airways PLC*, *supra* (reprinted at Pet. App. 34a-65a). See also M. Milde, *The Problems of Liabilities in International Carriage By Air* 55-56 (A. Kafka trans. 1969). Under that interpretation, *any* personal injury action brought by a passenger against a carrier for events arising in international air travel would be "subject to the conditions and limits of this convention." Because those "conditions" and "limits" include Article 17's substantive conditions for carrier liability, see *In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475, 1488-1489 (D.C. Cir.), cert. denied, 502 U.S. 994 (1991), that interpretation of Article 24 would preclude suits under local law where those conditions are unmet—*e.g.*, where the passenger suffered no "bodily injury," see *Floyd*, *supra*, or

where the injury did not arise from an "accident," see *Saks*, *supra*. For several reasons, we believe that this is the more faithful reading of the Convention.

First, this reading is consistent with the Convention's explicit textual insistence on international uniformity in the legal principles defining the circumstances under which a carrier will be exposed to liability.[13] Indeed, the first substantive sentence of the Convention, contained in the preamble, emphasizes the necessity of "regulating in a uniform manner the conditions of international transportation by air in respect of * * * the liability of the carrier." To achieve such uniformity, the Convention establishes a comprehensive set of legal principles governing the three major categories of liability (including personal injury) associated with international air travel, and it declares that those principles, along with the rest of the Convention, "shall apply to all international transportation of persons, baggage, or goods performed by aircraft." Art. 1(1); see also *Minutes*, *supra*, at 213 (remarks of British delegate) (Article 24 "touches the very substance of the Convention, because [it] excludes recourse to common law"); G.N. Calkins, *The Cause of Action Under the Warsaw Convention, Part I*, 26 J. Air L. & Com. 217, 227 (1959) ("the evidence is overwhelming that the conference reaffirmed the theory throughout that the convention would establish a system of liability complete in itself"). It is most unlikely that, despite those textual aspirations to legal uniformity, the Convention was intended to subject carriers to radically *non*-uniform liability under the peculiar legal regimes of

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[13] As noted on p. 5 above, those principles are distinct from the remedial issues that the delegates expressly left for resolution under domestic law. See *Zicherman*, 516 U.S. at 230-231.

the various signatories for injuries incurred during international air travel.[14]

Second, the structure of the Convention is far more consistent with a broad view of Article 24 than with the court of appeals' interpretation. One provision illustrating that point is Article 23, which generally invalidates "[a]ny provision [in a travel contract] tending to relieve the carrier of liability" to passengers. Cf. note 5, *supra*. By its terms, that provision appears applicable to any provision relieving carriers of *any* kind of liability to which they might be subject after ratification of the Convention. But the delegates' intricate compromise between the interests of passengers and the interests of carriers (see pp. 3-5, *supra*) would be defeated if the Convention were construed not only to bar a carrier from contracting out of its *limited* liability under the Convention itself, but also to perpetuate its exposure

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[14] The court of appeals erroneously sought support for its contrary position in the fact that the delegates amended the formal title of the Convention "to refer to the unification of '*certain rules*,'" rather than all rules, relating to international transportation by air. Pet. App. 16a-17a. As the House of Lords aptly observed in *Abnett*, however, it is undisputed, and immaterial to the present analysis, that "the Convention is concerned with certain rules only, not with all the rules relating to international carriage by air. * * * Nothing is said in this Convention about the liability of passengers to the carrier, for example. Nor is anything said about the carrier's obligations of insurance, and in particular about compulsory insurance against third party risks." *Id.* at 50a. The question presented here, however, is whether the Convention "unifies the rules" governing a subject that it *does* address: a carrier's liability to passengers for personal injury.

to *unlimited* liability under local law and to prevent it from contracting out of that liability as well.[15]

That the court of appeals' approach would produce such an asymmetric result strongly suggests that the delegates intended for Article 17 to speak comprehensively to the subject of a carrier's liability to passengers for personal injuries arising in international air travel. As the House of Lords concluded in *Abnett*, those delegates did not intend for the courts of the various signatories to "set[] alongside the Convention * * * an entirely different set of rules which would distort the operation of the whole scheme." Pet. App. 65a; see also *id.* at 53a-56a (noting other anomalies). That view of the House of Lords, as the final legal position of a sister signatory, is "entitled to considerable weight." *Saks*, 470 U.S. at 404.

Third, the drafting history of the Convention also supports a broad view of Article 24. See generally *Zicherman*, 516 U.S. at 226 (reaffirming role of negotiating history in interpretation of treaties). The question of Article 17's exclusivity typically arises in cases in which the event causing a passenger's injury was not an "accident"—in the broad sense applicable in this specialized context—because it was not "unexpected or unusual" and "external to the passenger." *Saks*, 470 U.S. at 405. The addition of the "accident"

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[15] The court of appeals reasoned that the Convention was designed to protect carriers only against potentially ruinous liability for "catastrophic incident[s]." Pet. App. 20a. But the Convention draws no distinction between "catastrophic" and "non-catastrophic" incidents. Indeed, by addressing a carrier's liability for damages due to delay (see Articles 19 and 24), the Convention makes clear that it sets forth a comprehensive system of liability for travel-related harms of all kinds, whether catastrophic or not. See also *Minutes*, *supra*, at 54-58 (discussing need for provision imposing liability for delay).

requirement came late in the drafting process; in the penultimate draft, all sources of carrier liability were grouped in a single Article, which, *inter alia*, made a carrier liable "in the case of death, wounding, or any other bodily injury suffered by a traveler." *Minutes*, *supra*, at 264-265 (quoted in *Saks*, 470 U.S. at 401); see also *id.* at 205-206. That Article was split in three, and recast into what are now Articles 17, 18, and 19, "primarily because delegates thought that liability for baggage should commence upon delivery to the carrier, whereas liability for passengers should commence when the passengers later embark upon the aircraft." *Saks*, 470 U.S. at 402; see also *Minutes*, *supra*, at 212-213, 229 (noting need to split Article 24 into separate subsections to accommodate creation of separate Articles 17, 18, and 19).

In adding the final clause of what is now Article 17 —"if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking"—the delegates accomplished two basic objectives: first, they clarified that carriers would be liable for injuries that were triggered by events occurring during (or around the time of) the flight but did not become manifest until later, see *Minutes*, *supra*, at 166-167,[16] and, second, they ensured that carriers would be liable only for events properly characterized as "accident[s]," see *Saks*, 470 U.S. at 405. In securing the latter objective, the delegates sought, of course, to confine the scope of a carrier's liability under the Convention. We have found nothing in the

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[16] See also *Minutes*, *supra*, at 80-84 (discussing need to distinguish harm to passengers from harm to baggage in fixing point in travel at which events could subject carrier to liability).

Convention's drafting history to suggest that the delegates intended, at the same time, to *expand* the scope of a carrier's unlimited liability under local law. But that would be the obvious (and very significant) consequence of their drafting change if the court of appeals' interpretation of the Convention's exclusivity provision were correct. The delegates' failure to endorse that consequence—or even to acknowledge it—suggests that the court of appeals' interpretation is not correct, and that the Convention bars actions under local law where a plaintiff could not satisfy Article 17's liability conditions.[17]

A similar conclusion follows from the substance of several formal proposals to amend the Warsaw Convention. "Because a treaty ratified by the United States is not only the law of this land, see U.S. Const., Art. II, § 2, but also an agreement among sovereign powers, [this Court has] traditionally considered as [an] aid[ ] to its interpretation * * * the postratification understanding of the contracting parties." *Zicherman*, 516 U.S. at 226. As discussed above (pp. 11-12 and note 7), Montreal Protocol No. 4, like the Guatemala City Protocol and Montreal Protocol No. 3, would replace the current introductory clause of Article 24(2) at issue here ("[i]n the cases covered by Article 17") with the phrase "[i]n the carriage of passengers and baggage."[18] The chief pur-

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[17] As observed in note 2 above, many international carriers voluntarily agreed in 1996 to waive the treaty-based limit on exposure to compensatory (though not punitive) liability. Such private agreements do not, of course, "purport to change or clarify the provisions of Article 17," and they "do[ ] not and cannot purport to speak for the signatories" to the Warsaw Convention. *Floyd*, 499 U.S. at 549.

[18] The Guatemala City Protocol, largely incorporated by Montreal Protocol No. 3, would have extended the liability

pose of that change is simply to distinguish cases involving harm to "passengers and baggage" from those involving harm to "cargo," to which different liability standards would apply. See, *e.g.*, Montreal Protocol No.4, Art. VIII; see also Guatemala City Protocol, Art. IX. At the same time, the proposed change in the introductory clause also makes abundantly clear that the Convention's "conditions" for, and "limits" on, liability apply to *all* suits by passengers for personal injuries arising in the course of international air travel, not just those in which the plaintiff could in fact satisfy the liability conditions of Article 17. See pp. 11-12, *supra*.

We have found no indication that the amendment to the introductory clause was designed to *alter* the Convention's preemptive effect on personal injury actions under local law.[19] That, however, would be the quite consequential effect of the proposed change *if* the court below were correct in believing that Article 24(2)'s original introductory clause ("[i]n the cases

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provision of Article 17 to any "event which caused the death or injury" of a passenger, provided that the death or injury did not result "solely from the state of health of the passenger." See *Saks*, 470 U.S. at 403-404. Montreal Protocol No. 4, by contrast, contains no amendment to Article 17.

[19] The present version of the proposed new introductory clause emerged in the drafting of the Guatemala City Protocol. At their ninth meeting, held on March 5, 1971, the delegates replaced the interim language "In the cases covered by Article 17 and in cases of delay of passengers and baggage" with "In the carriage of passengers and baggage." See 1 International Civil Aviation Org., *International Conference on Air Law, Guatemala City, Feb.-Mar. 1971* (Minutes) 301; 2 International Civil Aviation Org., *International Conference on Air Law, Guatemala City, Feb.-Mar. 1971* (Documents) 172. There was no objection to that change, proposed by the Irish and Swedish delegates, and it was adopted without substantive discussion.

covered by Article 17") confined the Convention's preemptive effect to cases in which a plaintiff could satisfy the liability conditions of Article 17. The noncontroversial removal of that original clause in the drafting of the subsequent protocols suggests that the decision below is *not* correct; that the clause has not been understood to confine the Convention's preemptive effect to cases in which Article 17's liability criteria are met; and that the clause is instead interchangeable with, and substantively identical to, the proposed new language that would replace it. That conclusion would be fortified by, but is not ultimately dependent upon, ratification by the United States of Montreal Protocol No. 4, which has now entered into force in the numerous other countries that have ratified it.

B. Ratification of Montreal Protocol No. 4 By The United States Could Affect The Court's Consideration Of This Case

After this Court granted certiorari, Montreal Protocol No. 4 entered into force on June 1998 in the countries that had ratified it, and, shortly thereafter, the Senate Foreign Relations Committee voted to report the Protocol to the full Senate for its consideration. See pp. 10-11, *supra*. As of the filing of this brief, the Senate had not yet taken action on the matter.

As we advised this Court in our letter of July 1, 1998 (see note 5, *supra*), ratification of Montreal Protocol No. 4 by the United States could substantially affect the Court's consideration of this case. First, where ratification has made the Protocol applicable to a given case (see, *e.g.*, Montreal Protocol No. 4, Art. XIV), the Protocol supersedes Article 24(2)'s original introductory clause, which is the

proper focus of this dispute. Ratification of Montreal Protocol No. 4 by the United States would thus diminish the continuing legal significance of any resolution of this dispute.[20] At the same time, such ratification, combined with the Protocol's recent entry into force elsewhere, might itself be relevant to a proper interpretation of Article 24's original text. See pp. 26-28, *supra*; see generally *Zicherman*, 516 U.S. at 226 (affirming importance of "the postratification understanding of the contracting parties" in treaty interpretation); cf. *Floyd*, 499 U.S. at 550 ("because the United States Senate has not ratified the [Guatemala City] Protocol we should not consider it to be dispositive"); *Saks*, 470 U.S. at 403 (because the Montreal and Guatemala City Protocols "have yet to be ratified by the Senate," they "do not govern the disposition of this case"). We will keep the Court apprised of further developments with respect to the ratification of Montreal Protocol No. 4.[21]

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[20] Whether the Protocol has retroactive application is an issue that this Court would not normally address in the first instance.

[21] Airport security searches like the one at issue here are subject to a detailed federal regulatory scheme administered by the Department of Transportation. See 49 U.S.C. 44901 *et seq.*; 14 C.F.R. Pts. 107, 108. Because this Court granted certiorari to review only the question of the Warsaw Convention's exclusivity, there is no occasion to address whether that regulatory scheme preempts state law tort actions arising from such security searches.

CONCLUSION

The judgment of the court of appeals should be reversed insofar as it holds that respondent's personal injury claim may proceed under state law even if she cannot satisfy the conditions for liability under the Convention.

Respectfully submitted.

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